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No. 84-1971

In the Supreme Court of the United States

October Term, 1984

SUN OIL COMPANY,
Petitioner,

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and As Representatives of All Producers and Royalty Owners to Whom Sun Oil Company Has Made or Should Make Payment of Suspended Proceeds of Royalties Pursuant to FPC Opinions or FERC,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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QUESTIONS PRESENTED

The questions presented here are identical to those in *Phillips Petroleum Company v. Shutts, cert. granted,* ..... U.S. ....., 105 S. Ct. 242 (1984) (arguments heard on February 25, 1985). As in *Shutts,* the Kansas courts here certified a nationwide class and applied Kansas law to claims arising in other states between nonresidents of Kansas. Kansas had no connection with the transactions. In so proceeding, the Kansas courts improperly asserted jurisdiction over a nationwide class and also ignored the conflicting substantive law applicable to the claims which arose in other states.

Accordingly, the questions presented are:

1. Do basic principles of federalism and the due process clause of the Fourteenth Amendment permit a state court to exercise jurisdiction over unnamed class members and their claims when (1) the class members are nonresidents and have no contacts with the forum states; (2) the class members have not affirmatively consented to the court's jurisdiction; and (3) the claims arose entirely in other states and the forum has no significant interest in them?

2. Do the due process clause of the Fourteenth Amendment and the full faith and credit clause of the Constitution allow a state court, in a nationwide class action, to apply its own law to transactions between nonresidents that occur in other states and to which the forum has no connection?

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RICHARD WORTMAN and HAZEL MOORE, Individually and As Representatives of All Producers and Royalty Owners to Whom Sun Oil Company Has Made or Should Make Payment of Suspended Proceeds of Royalties Pursuant to FPC Opinions or FERC,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Petitioner Sun Oil Company[1] prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Kansas entered in these proceedings October 26, 1984.

OPINIONS BELOW

The opinion of the Supreme Court of Kansas (236 Kan. 266, 690 P.2d 385) is set forth at page A2 of the Appendix. The unpublished Memorandum Decision of the District Court of Barber County, Kansas, is set forth on page A13 of the Appendix; and the unpublished Journal Entry of Judgment of said court is set forth on page A27 of the Appendix.

1. Petitioner's statement pursuant to Supreme Court Rule 28.1 is set forth in the Appendix on page A34.

JURISDICTION

The opinion of the Supreme Court of Kansas was entered on October 26, 1984. A motion for rehearing was filed on November 15, 1984, and was denied on April 12, 1985.[2] The Petition for A Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . .

Article 4, § 1 of the United States Constitution provides in pertinent part:

> Full faith and credit shall be given to each state to the public acts, records, and judicial proceedings of every other state.

The statutory provision involved is K.S.A. § 60-223, which is set forth at page A30 of the Appendix.

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2. The order denying rehearing is set forth at page A1 of the Appendix.

STATEMENT OF THE CASE

This case rose through the Kansas courts a few months after *Phillips Petroleum Company v. Shutts*,[3] *cert. granted*, ... U.S. ....., 105 S. Ct. 242, and presents virtually identical facts. Petitioner in this case, Sun Oil Company (Sun), is a Delaware corporation with its principal place of business in Texas. Most of the plaintiffs are owners of mineral leaseholds located either in Texas, Oklahoma, or Louisiana, and a few of the plaintiffs own mineral leaseholds located in Mississippi, New Mexico, or Kansas. In the Kansas courts, the plaintiff royalty owners sought interest on certain price increases for sales of natural gas which were received by Sun, but which were "suspended" for a period of time.

Sun produces natural gas from lands owned by respondents. The gas is produced for transportation and resale in interstate commerce at prices regulated by the Federal Energy Regulatory Commission (F.E.R.C.), successor to the Federal Power Commission (F.P.C.). The "suspended" royalties arose pursuant to F.P.C. regulations which allowed Sun to begin charging its purchasers increased prices even though the price increases had not

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3. In noting that this case presents the same class action issues and choice of law issues presented in *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 679 P.2d 1159, *cert. granted*, ... U.S. ....., 105 S. Ct. 242 (1984), the Kansas Supreme Court stated as follows:

> The foregoing issues concerning commonality, due process, and improper interest are identical to those raised and decided in our previous decision in Shutts II . . .
>
> It is interesting to note Sun Oil Company, appellant in this case, filed an amicus brief in Shutts II in opposition to the royalty owners' position there. All three issues were thoroughly discussed and decided adverse to Sun's position in that case.

Wortman v. Sun Oil Co., 236 Kan. 266, 270, 690 P.2d 385, 389-90 (1984), Appendix page A8.

yet been finally approved by the F.P.C. *See* 18 C.F.R. § 154.67 (1981). If the price increases were not ultimately approved, they were to be refunded to the purchasers. Sun received the price increases but continued to pay out royalties only on that portion of the gas price not related to the price increases. After the final resolution of court challenges to the pertinent F.P.C. Opinions (regarding the price increases), the additional "suspended" royalties were promptly remitted to Sun's royalty owners.

While the leaseholds involved in this action are from Texas, Oklahoma, Louisiana, New Mexico, Mississippi, and Kansas, there is no contention that the *non-Kansas* lessors have any relationship whatsoever to the State of Kansas. Their leaseholds are located outside of Kansas. Their lease contracts were executed pursuant to the laws of states other than Kansas. Their minerals are located outside of Kansas. And there is no contention that the sale of natural gas produced from their leaseholds, or any of the price increases or interest claims herein involved, have any relationship to Kansas.

The price increases which were the basis for the Kansas court action were set out in F.P.C. Opinions 699, 699H, 770, and 770A.[4] It was during the administrative and court appeals concerning these F.P.C. price increases that Sun began to receive the increased rates on which plaintiffs now claim interest.

The price increases allowed by Opinions 699 and 699H were collected by Sun from July, 1974, through April, 1976. The increased royalties were paid out in July, 1976.

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4. F.P.C. Opinion 586 was also involved, but only $13,000 in suspended royalties were at issue. The $13,000 was paid out by Sun in 1978. The record does not reflect whether any of the $13,000 involved Kansas properties. Overall, only 9.2% of the Sun properties affected by Opinion 586 were in Kansas.

A total of 670 properties were involved: 43.7% from Texas, 24% from Oklahoma, 22.8% from Louisiana, 3.9% from New Mexico, 3.4% from Mississippi, and 2.1% from Kansas. The suspended royalties paid to lessors from Kansas represent only six-hundredths of one percent [.0006] of the total amount of money involved.

The price increases allowed by Opinions 770 and 770A were collected by Sun between December, 1976, and April, 1978. The increased royalties were paid out principally in April, 1978. A total of 690 properties were involved: 40.3% from Texas, 31.6% from Oklahoma, 23.6% from Louisiana, 3.3% from New Mexico, 0.9% from Mississippi, and 0.3% from Kansas. The suspended royalties paid to lessors from Kansas represent five-tenths of one percent [.005] of the total amount of money involved.

Plaintiffs' lawsuit was filed as a class action on August 30, 1979. The Kansas District Court certified a nationwide plaintiff class. On October 13, 1983, the case was tried to the District Court of Barber County, Kansas, without a jury, and on December 12, 1983, the Court issued a written Memorandum Decision (Appendix page A13) holding Sun liable to the thousands of royalty owners involved.[5] The Court applied the Kansas legal standards regarding the recovery of interest, despite the fact that only $13,695 of the $3,843,000 of suspended royalties paid out was attributable to Kansas leases. It is the interest on those suspended royalties which is involved in this action.

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5. The constitutional issues involved herein were initially raised in Sun's Answer. Each of the constitutional arguments pertaining to nationwide class actions and the choice of law issues were again raised at trial and were extensively addressed in the Requested Findings of Fact and Conclusions of Law which Sun filed with the Kansas District Court. Further, all such issues were fully briefed and argued to the Kansas Supreme Court.

The Kansas Supreme Court affirmed the decision of the lower court. In so ruling, the Kansas Supreme Court noted that the legal issues presented in this case are identical to those presented in *Phillips Petroleum Co. v. Shutts*. *Wortman v. Sun Oil Co.*, 236 Kan. 266, 270, 690 P.2d 385, 389-90 (1984), Appendix page A8.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION INVOLVING THE LIMITS OF STATE COURT JURISDICTION THAT HAS BEEN THE SUBJECT OF CONFLICTING DECISIONS IN STATE COURTS, THAT HAS IMPORTANT PRACTICAL CONSEQUENCES FOR ALL THE STATES, AND THAT CAN ONLY BE RESOLVED BY THIS COURT.

In this case as in the *Shutts*[6] case which rose through the Kansas courts a few months earlier, the Kansas court has extended its jurisdictional reach over unnamed class members further than any other state court. The Kansas court held that all assertions of jurisdiction over unnamed class members from other states are constitutional if those class members are provided with notice and adequate representation, and that Kansas law will be applied to claims normally governed by the laws of the state in which the claims arose.

The jurisdictional issue is important because the court below resolved fundamental questions of federalism in a manner which is at odds with prior holdings of this Court.[7]

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6. *Phillips Petroleum Company v. Shutts, cert. granted,* ..... U.S. ....., 105 S. Ct. 242 (1984).

7. Petitioner has standing to raise the question of jurisdiction over these nonresident class members. This Court has

(Continued on following page)

In *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977), this Court stated that "*all* assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny * * *." Three years later, in *Rush v. Savchuk*, 444 U.S. 320 (1980), this Court acknowledged the continuing validity of the foregoing language from the *Shaffer* case. *See Rush*, 444 U.S. at 327. Particularly in a case like this, where there is a complete absence of contact between the forum state and the nonresident class members, the "minimum contacts" requirement is not satisfied. *Rush v. Savchuk*, 444 U.S. at 332-33; note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv. L. Rev. 718, 731 (1979) ("No matter how heavily the scale might otherwise tip against the nonresident, jurisdiction will not be upheld where the nonresident has no contacts whatsoever with the particular state.").

The diverse rulings which state courts have issued on these types of class action issues interject an element of uncertainty and tension into our system of federalism which only this Court can resolve. The Kansas courts have twice held (in this case and in the *Shutts* case) that nationwide class actions will be entertained by the Kansas courts despite the lack of any *nexus* whatsoever between Kansas and the unnamed class members. Illinois has also ignored the nexus requirement. *Miner v. Gillette Co.*, 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. granted*,

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Footnote continued—

held that when, as here, acquisition of jurisdiction over a nonresident is required before a state court is empowered to proceed with the action, then "any defendant affected by the court's judgment has that 'direct and substantial personal interest in the outcome' that is necessary to challenge whether that jurisdiction was in fact acquired." *Hanson v. Denckla*, 357 U.S. 235, 245 (1958).

456 U.S. 914, *cert. dismissed,* 459 U.S. 86 (1982). In direct conflict are the Pennsylvania and New Jersey courts, which have properly required nexus. *Klemow v. Time, Inc.,* 466 Pa. 189, 352 A.2d 12, *cert. denied,* 429 U.S. 828 (1976) (plaintiff class limited to residents and those nonresidents who submit themselves to the court's jurisdiction); *Feldman v. Bates Mfg. Co.,* 143 N.J. Super 84, 362 A.2d 1177 (App. Div. 1976) (a state court cannot assert jurisdiction over nonresident class members who have no "contacts, ties or relations" with the state).

The Wisconsin and Delaware courts have issued decisions which can be seen as allowing the assertion of jurisdiction over unnamed class members when the underlying claims have a nexus with the forum state. *Schlosser* v. *Allis-Chalmers Corp.,* 86 Wis. 2d 226, 271 N.W.2d 879 (1978); *Geller v. Tabas,* 462 A.2d 1078 (Del. 1983). *See also, Shutts v. Phillips Petroleum Co.* ("*Shutts I*"), 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied,* 434 U.S. 1068 (1978), *reh'g denied,* 435 U.S. 961 (1978). The New York courts have analyzed the requisite relationship between class action litigation and a forum. *Brandon v. Chefetz,* 121 Misc. 2d 54, 467 N.Y.S.2d 312 (N.Y. Sup. Ct. 1983). And, the California courts have discussed, but not decided, the issue of jurisdiction over nonresident class members. *Anthony v. General Motors Corp.,* 33 Cal. App. 3d 699, 109 Cal. Rptr. 254, 260 (1973).

The broad spectrum of state court decisions regarding assertions of jurisdiction over unnamed class members creates uncertainty and conflict, and will inevitably place an impermissible and *unnecessary* strain upon our system of federalism. For example, the Kansas court's decision in this case will almost certainly be unenforceable in New Jersey, in Pennsylvania, and in the unknown number of other states which may choose to follow New Jersey and Pennsylvania.

The pressure placed on our system of federalism is exacerbated by the fact that unbridled assertions of jurisdiction over nationwide classes, by their very nature, create a legal environment which effectively denies many states the opportunity to decide important legal questions affecting their citizens; and not because the residents of those states have affirmatively chosen to litigate their claims in other forums, such as in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. ....., 104 S. Ct. 1473 (1984). It is the minimum contacts requirement which helps to "ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

This case is a fine example of the way in which assertions of jurisdiction, free of the strictures of "minimum contacts," make some states powerful and other states powerless. Although the Kansas courts have entertained numerous class actions (involving nonresidents) concerning awards of interest on suspended royalties, Oklahoma has never had an opportunity to decide a suspense royalty case. It is not simply a question of whether Oklahoma law should be applied, but whether Oklahoma should be allowed to determine what its law is, especially when unnamed Oklahoma class members have not affirmatively chosen to have their claims litigated in Kansas, a state with which they have no contacts. By entertaining the current class action, the court below transformed the Kansas state court into a national court. The Kansas court's action, if allowed to stand, will eliminate the courts of Oklahoma and Texas from any meaningful role in adjudicating claims involving their own residents, even though more than 1,100 Oklahoma and more than 1,150 Texas leases are involved.

If nationwide class actions are allowed despite the unnamed class members' lack of either minimum contacts with the forum or of their affirmative consent to jurisdiction, races to the courthouse will determine which states are powerful and which states are powerless. Many states will be disenfranchised from any role in adjudicating claims involving their own residents, even though those residents have not affirmatively chosen to litigate in a foreign jurisdiction.

A state is not acting as a "coequal sovereign" when it renders decisions which encourage forum shopping. Lawyers for would-be plaintiffs groups will actively seek out those forums which allow cases like this one to be heard in their courts. And, even if every state were to assert jurisdiction over cases involving nationwide classes, plaintiffs' lawyers would still "forum shop" for those states with the most sympathetic procedural or conflicts-of-law rules; knowing that they have the right to represent unnamed class members unless those class members take affirmative action to exclude themselves from the litigation. This Court should grant certiorari to decide whether our principles of federalism envision or permit these contact-less nationwide class actions.

Given the Kansas court's ruling that the minimum contacts standards apply to defendants and not to plaintiffs, this Court should grant review to determine whether such a distinction is constitutionally sound. The very nature of modern litigation, and in particular, the increasing use of declaratory judgment actions and "defendant classes" blurs the distinction between plaintiffs and defendants.

Even an unnamed plaintiff class member has important rights at stake, irrespective of the fact that she is designated as a "plaintiff." A cause of action "is a species

of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). The fact that the decision below was rendered by Kansas, the state which apparently has the most liberal view in the nation with respect to awarding interest, should not be used to blur the point that it makes no sense, constitutionally or otherwise, to permit legal doctrines which set different minimum contacts criteria for plaintiffs and defendants. All parties, both plaintiff and defendant, deserve the protection of the minimum contacts requirement.

An adverse judgment is no less intrusive upon a plaintiff class member's property interest than any other adverse judgment. For example, imagine a case in which a Kansas royalty owner with a suspense royalty claim is involuntarily joined in a class action in Louisiana—where the interest rate is seven percent and no "interest on interest" can be awarded. Louisiana Civil Code, Articles 1938 and 1939. *Succession of Drake*, 359 So. 2d 249 (La. App. 1978). The Kansas resident obviously would have a lot at stake (and a lot to lose) and should have the right *not* to have her claim adjudicated by a Louisiana court, *unless* she has minimum contacts with Louisiana (or unless she affirmatively subjects herself to jurisdiction in that state).

In short, this case presents the identical jurisdictional issues presented in the *Phillips Petroleum Co. v. Shutts* case. Review should be granted, so that the result in this case will be consistent with the federal constitutional principles to be applied by this Court in *Shutts*.

II. BY HOLDING THAT ONLY KANSAS LAW APPLIES TO ALL CLAIMS IN THE CLASS ACTION, THE DECISION BELOW VIOLATES SUN'S RIGHTS SECURED BY THE DUE PROCESS AND FULL FAITH AND CREDIT CLAUSES.

The Kansas court applied Kansas law to the claims of all class members. In so doing, the Kansas court has ignored this Court's recent holding that "for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its laws is neither arbitrarily nor fundamentally unfair." *Allstate Insurance Co. v. Hague,* 449 U.S. 302, 312-13 (1981). The egregious nature of the Kansas court's ruling is amplified by the fact that Texas has ruled that in actions for "suspense royalties" based upon Texas oil and gas leases, a plaintiff's claim obtains its substantive basis from the Texas interest statute, not from the FPC/FERC "undertaking" rates adopted by Kansas. *Phillips Petroleum Co. v. Stahl Petroleum Co.,* 569 S.W.2d 480 (Tex. 1978). The interest statutes from the other states involved represent legislative pronouncements of those states' substantive policies regarding interest, and Kansas has no right to belittle or ignore those laws simply because those states have set interest rates, by statute, at rates lower than those which the Kansas courts have chosen to award under Kansas law. Kansas has clearly trampled on the substantive[8] policies of other states.

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8. It cannot seriously be doubted that each state has the right to pronounce its own substantive rules regarding awards of interest. Interest is a matter of substantive law, governed by the laws of the State in which a cause of action arises. "Texas considers interest damages as a substantive matter controlled by the law of the state where the cause of action arose." *Bott v. American Hydrocarbon Corp.,* 458 F.2d 229, 231 (5th Cir. 1972).

(Continued on following page)

The opinion below violates Sun's due process rights by imposing Kansas law upon, for example, the dispute between Sun and its Texas royalty owners. There is no contention that the Texas lessors have any relationship whatsoever to the State of Kansas. Their leaseholds are located outside of Kansas. Their lease contracts were executed pursuant to the laws of Texas. Their minerals are located outside of Kansas. And there is no contention that the sale of natural gas produced from their leaseholds, or any of the price increases or interest claims involved herein, have any relationship to Kansas. The contractual relationship between Sun and property owners in Texas is obviously governed by Texas law. The refusal of the Kansas Court to apply that law is a denial of due process, and a violation of the full faith and Credit Clause of the United States Constitution.

Another example of the Kansas court's ignoring the applicable law of other states is its treatment of the statute of limitations issue—a point not involved in the *Shutts* case. Kansas, like many states, has a statute which requires the Kansas courts to apply the statute of limitations from the state in which the claim arose.[9] Yet in the

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Footnote continued—

Similarly, under Louisiana law, interest is a substantive issue governed by the law of the State in which the cause of action arose. *Williams v. Petroleum Helicopters, Inc.*, 234 So. 2d 522 (La. App. 1970). *See also Glazer v. Glazer*, 278 F. Supp. 476, 486 (E.D. La. 1968); *Morris v. Watsco Inc.*, 385 Mass. 672, 433 N.E.2d 886 (1982); and *Tennessee Carolina Transport, Inc. v. Strick Corp.*, 283 N.C. 423, 196 S.E.2d 711 (1973).

9. K.S.A. § 60-516 provides: "Where the cause of action has arisen in another state or country and by the laws of the state or country where the cause of action arose an action cannot be maintained thereon by reason of lapse of time, no action can be maintained thereon in this state except in favor of one who is a resident of this state and who has held the cause of action from the time it accrued."

present case, the Kansas court chose to ignore that statute in deciding that it would apply the five year Kansas limitations statute to all claims. *Wortman,* 236 Kan. 266, 270-73, 690 P.2d 385, 390-91 (1984), Appendix at page A11.

The statute of limitations issue pertains to those claims arising out of royalties suspended pursuant to F.P.C. Opinions 699 and 699H. These suspended royalties were paid out by Sun in July, 1976. Plaintiffs' lawsuit was not filed until August, 1979, or more than three years later. The Kansas Supreme Court ruled that pursuant to the so-called "United States Rule" (which provides for interest-on-interest), the suspense *royalty* payments made by Sun were not really royalty payments, but were, in fact, *interest* payments—thus leaving a portion of the royalties unpaid. This, in turn, led to invocation of the Kansas five year statute of limitations pertaining to written contracts, K.S.A. 60-511, rather than the three year statute otherwise applicable to plaintiffs' interest claims, K.S.A. 60-512.

The "substantive" nature of the statute of limitations issue is exemplified by the fact that at least two of the states involved, Louisiana and New Mexico, do not appear to allow awards of interest-on-interest. Louisiana Civil Code, Article 1939 (1983 Supp.); *Southern Union Exploration Co. v. Wynn Exploration Co., Inc.,* 624 P.2d 536, 543 (N.M. App. 1981). Furthermore, in Louisiana, even claims for royalty are barred by the Louisiana three year statute of limitations. *O'Neal v. Union Producing Co.,* 153 F.2d 157, 158 n.2 (5th Cir.), *cert. denied,* 329 U.S. 715 (1946). Finally, the two year Texas statute of limitations applies to claims like those presented in this case, *Hull v. Freedman,* 383 S.W.2d 236 (Tex. Civ. App. 1964);

and Oklahoma and Mississippi have three-year statutes for such claims. 12 Okla. Stat. Ann. § 95; Mississippi Code § 15-1-29 (1984 Supp.). The conflicts-of-law issue is whether Kansas should be required to classify the out-of-state claims pursuant to the laws of the state in which they arose. The statute of limitations issue is more than a procedural nicety, it is a substantive issue which affects the contractual and property rights of both Sun and the unnamed class members.

This case squarely presents the issue of whether a State's application of its own statute of limitations creates an unfairness which "rises to the level of a due process violation." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. ....., 104 S. Ct. 1473, 1480 n.10 (1984). This important constitutional issue, which has been left open by recent decisions of this Court, *id.*, should now be decided. *See, e.g.*, Weintraub, *Commentary on the Conflict of Laws* § 9.2B at 517 (2d ed. 1980); Martin, *Constitutional Limitations on Choice of Law*, 61 Cornell L. Rev. 185, 221 (1976).

CONCLUSION

For the reasons stated, the Petition for A Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

(Dated April 12, 1985)

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 34-56494-AS

Richard Wortman and Hazel Moore, et al., Appellees,

v.

Sun Oil Company, a Delaware Corporation, Appellant.

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellant for Rehearing.

DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date April 12, 1985

received suspense royalties from Sun as a result of Opinion Nos. 586, 699, 699H, 770 and 700A pertaining to gas rates. First class mail notices have been mailed to all of such royalty owners in accordance with pressure sensitive mailing labels furnished for each member of the class by Sun. Plaintiffs have caused the notices to be mailed and have borne the expense thereof. As a result of the notice, 105 members of the class have been specifically excluded and 50 addressees did not receive the notice, leaving total notices received of 3,003, who are class members in this case.

Testimony at time of trial included the deposition of George Wehrmaker, controller for Sun, who testified in part as follows:

> "Q. As Sun Gas received monies, FPC suspense monies, pursuant to Opinion 699, FPC Opinion 699, and pursuant to FPC Opinion 770, and any other applicable opinion where they were suspended, how were those monies handled? Were they handled like any other corporate money, put in the corporate treasury?
>
> A. I believe so, yes . . . So far as I know, that would be the way it would be treated.
>
> Q. The matter of suspense refers only to an accounting system, is that correct?
>
> A. Yes.
>
> Q. In other words, the money is not separated out and deposited in a separate bank account?
>
> A. That's correct.
>
> Q. Or separate investments of any kind?
>
> A. That's correct.

Q. The money from FPC suspense gas was used then by Sun Gas Company just as any other case or money?

A. I believe so, yes.

Q. Used to make a profit?

A. I hope so, yes."

Meanwhile, Sun made substantial profits, after taxes and interest expense, the amount for the United States being $367,000,000.00 in 1979.

Sun handled the suspense royalties for all royalty owners nation-wide in the same manner and they were paid out at the same time and in the same manner.

Sun furnished to the Federal Power Commission an agreement and undertaking to comply with the provisions of Subsection (c) of §154.102 of the Commission's regulations under the Natural Gas Act, copy which was an exhibit at time of trial and is attached hereto.

Copy of 18 CFR 154.67 and Federal Reserve Bulletins on prime rate charged by banks were made a part of the exhibits at time of trial. These exhibits show that if the rates were not approved, Sun would owe the purchasers interest at 7% per annum until October 10, 1974, at 9% per annum thereafter until September 30, 1979, and that the average prime rate, compounded quarterly, charged by banks according to Federal Reserve Bulletins until date of judgment.

As to all gas royalty owners and overriding royalty owners to whom Sun was accounting, Sun collected all proceeds from the proposed increased rates including that fraction or percentage increase which belonged either to royalty owners or to purchasers and could in no event belong to Sun. The money belonging to others was de-

posited to cash in Sun's general account and commingled with its other funds during the suspension periods.

The applicable rates of interest which Phillips would have been required to pay pursuant to the corporate undertaking are established by 18 CFR, §154.67, as follows:

Until October 10, 1974, 7%

October 10, 1974, to September 30, 1979, 9%

October to December, 1979 (June, July, August average) 11.70%

January to March, 1980 (December, January, February) 14.28%

April to June, 1980 (March, April, May) 15.39%

July to September, 1980 (June, July, August) 18.22%

October to December, 1980 (September, October, November) 11.74%

January to March, 1981 (December, January, February) 14.03%

April to June, 1981 (March, April, May) 19.98%

July to September, 1981 (June, July, August) 18.27%

October to December, 1981 (September, October, November) 20.31%

January to March, 1982 (December, January, February) 18.46%

Further rates as determined by Federal Reserve Bulletins

The dates and the amounts of suspense royalties collected by Sun and the dates and amounts of payments of this money by Sun are contained in the records of defen-

dant Sun and are readily ascertainable through the use of their computer.

CONCLUSIONS OF LAW

As a legal proposition, this case is identical to *Shutts v. Phillips Petroleum*, 222 Kan. 527, 567 P.2d 1392 (1977), cert. denied 435 U. S. 961. The only factual distinction is the FPC began making its rate nationally rather than regionally, beginning with Opinion No. 699. Insofar as royalty owners are concerned, the size and scope of the class was naturally determined by the size and scope of the FPC rate structure. Royalties under Opinion Nos. 699 and 770 were suspended, used by Sun and paid out in the same manner and at the same time to all of Sun's royalty owners involved in the six states where Sun produces natural gas.

Sun does business in Kansas and was served with process in Kansas. No question is asserted as to the jurisdiction of the court over Sun. However, Sun contends the Kansas District Court lacks personal jurisdiction over nonresident members of the plaintiff class and, therefore, the court cannot adjudicate the respective rights to interest against Sun without violating their rights to due process. However, as a general rule, "one may not claim standing . . . to vindicate the constitutional rights of some third party." *Singleton v. Wulff*, 428 U. S. 106, 114 (1976), quoting *Barrows v. Jackson*, 346 U. S. 249, 255 (1935). The purpose behind this rule is twofold:

> "First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them or will be able to enjoy them regardless of whether the court litigant is successful or not. . . Second, third parties themselves usually will be the best proponents of

their own rights." (*Singleton v. Wulff*, 428 U. S. at 113-114.)

This rule is particularly compelling where Sun's position is directly adversary to the class members, the class members were given first class mail notice, and elected to stay in the action. No class member has contested the requested judgement against Sun. By attempting to eliminate nonresident members of the class, Sun is attempting to eliminate most of its liability. It is not really interested in the rights of nonresident plaintiff class members except to eliminate such liability. The members who have stayed in the class have stayed in after due notice and because they want to collect the interest which is due them. They are represented by the named plaintiffs and by attorneys for the plaintiff class, not by Sun.

Nonresident plaintiffs have chosen Kansas as the forum by electing to stay in the case rather than to exclude themselves. The U. S. Supreme Court has ruled many times on the question of whether a judgement in a plaintiff class action is binding upon class members who are not residents of the forum state. (See *Hansberry v. Lee*, 311 U. S. 32 (1940); *Soverign Camp of the Woodmen of the World v. Bolin*, 305 U. S. 66 (1938); *Supreme Council of Royal Arcanum v. Green*, 237 U. S. 531 (1915); *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356 (1921); *Hartford Life Insurance Co. v. Barber*, 245 U. S. 146 (1917); *Hartford Life Insurance Co. v. Ibs*, 237 U. S. 662 (1915). Each of these decisions arose within the firm factual framework, i.e., a class member seeking to enforce or attack a judgement in the court of a sister state, and in each case the due process issues were raised by a party whose rights had been adjudicated in his absence. However, it was held that such party was bound as a class member.

Sun argues that only Wortman and a few other members of the class are Kansas residents and so the class consisting of all of Sun's royalty owners in six states should not have been certified. The argument is not new. The same argument was made in Shutts, *supra,* and was answered in that opinion, Pages 541 to 558 as follows:

1. The "minimum contacts" test applies to nonresident *defendants,* not plaintiffs. (P. 541-542.)

2. The element necessary to the exercise of jurisdiction over nonresident plaintiff class members is *due process.* (P. 543.)

3. In suits of a representative character, if a class is adequately represented, its interests are protected. (543-544.)

4. "If state courts cannot maintain class action suits with nonresident plaintiffs, can the 'small man' find legal redress in our modern society. . .?" (P. 545.)

5. "The appellant argues this action should be brought in several different state courts. This risks inconsistent adjudications for a class which otherwise is treated alike." (P. 545.)

6. "There are questions of law and fact common to the plaintiff class" (residents and nonresidents). (P. 546.)

7. "After reviewing K.S.A. 60-223, we hold Kansas courts can exercise jurisdiction over nonresident plaintiffs in a class action of procedural due process guarantees are met." (P. 547.)

8. ". . . a class action may be binding on nonresident plaintiffs when a '*common fund*' is involved and where due process requirements are met." (P. 552.)

9. "Here the notice given fully comports with Federal Rule No. 23, K.S.A. 60-223 and any possible constitutional requirements." (P. 554-444.)

10. ". . . adequate representation has been accorded the plaintiff class members by their representative through his attorneys who have done a superior job. . ." (P. 556-557.)

11. The class is more manageable with nonresidents of Kansas included because all royalty owners were treated alike, regardless of residency, particular lease provisions or royalty agreements. (P. 556.)

12. All of the royalty owners have a common interest in the money collected as suspense royalties. (P. 557-558.)

13. It was the same FPC regulation that caused the suspense royalties to be collected. (P. 558.)

14. Suspense royalties were paid out pursuant to the same FPC Opinion. (P. 558.)

15. All of the gas royalty owners have an interest in common with each other, in the equivalent of a "common fund" to a claim damages payable as interest, and *they have a contact with Kansas by reason of such common interest.* (P. 558.)

All of the following cases, involve identical legal issues and factual situations, to the *Shutts* case, *supra,* and they all hold that it was proper to include nonresident plaintiff class members:

a. *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292, cert. denied 434 U. S. 1068.

b. *Gray v. Amoco Production Co.*, 1 Kan. App. 2d 338, 564 P.2d 579; 223 Kan. 441, 573 P.2d 1080.

c. *Maddox v. Gulf Oil Corp.*, 222 Kan. 733, 567 P.2d 1326, cert. denied 98 S. Ct. 1242.

d. *Sterling v. Marathon Oil Co.*, 223 Kan. 686, 576 P.2d 634.

e. *Sterling v. Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325, cert. denied 98 S. Ct. 1246.

f. *Nix v. Northern Natural Gas Producing Co. and Mobil*, 222 Kan. 739, 567 P.2d 1332, cert. denied 98 S. Ct. 1246.

g. *Helmley v. Ashland Co., Inc.*, 1 Kan. App. 2d 532, 571 P.2d 345.

The holdings of the Kansas court are consistent with U.S. Supreme Court decisions, federal court decisions and decisions of other states.

Accordingly, both because there is no present deprivation of any right of a class member and also because Sun lacks standing to argue the due process rights of its adversaries, this court declines to review the constitutional question presented.

Nonresident plaintiff class members have submitted themselves to the jurisdiction of the Kansas Court. The Kansas statute, K.S.A. 60-223, is copied after the federal rule, F.R. Civ. P. 23. Provisions in both the federal rule and the Kansas statute are practically the same pertaining to members electing to exclude themselves after proper notice. To bind absent class members, the due process protections of notice and representation must be afforded. (Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950).) Adequate notice has been provided in this case and Sun challenges neither the method of notice (by first class mail) nor the form or quality of representation.

It is without question in Kansas that producers owe interest to their royalty owners on FPC suspense royalties

held and used by the producers. (*Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292, cert. denied 98 S. Ct. 1246; *Gray v. Amoco Production Co.*, 1 Kan. App. 2d 338, 564 P.2d 579; 223 Kan. 441, 573 P.2d 1080; *Maddox v. Gulf Oil Corp.*, 222 Kan. 733, 567 P.2d 1326, cert. denied 98 S. Ct. 1242; *Sterling v. Marathon Oil Co.*, 223 Kan. 686, 576 P.2d 634; *Sterling v. Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325, cert. denied 98 S. Ct. 1246; *Nix v. Northern Natural Gas Producing Co.*, 222 Kan. 739, 567 P.2d 1332, cert. denied 98 S. Ct. 1246; and *Helmley v. Ashland Oil Co., Inc.*, 1 Kan. App. 2d 532, 571 P.2d 345.)

Sun is liable for interest on all royalty and overriding royalty retained by it during the period that royalty was collected and suspended by Sun pending approval by the FPC (FERC) and the courts of certain rate increases under Opinion No. 586 as to suspend royalties paid in 1978 and under Opinion No. 699 and 770, with the exception of those who excluded themselves and those whom the first class mail notice did not reach.

The applicable rate of interest for which Sun is liable is seven percent (7%) per annum until October 10, 1974, nine percent (9%) per annum thereafter until September 30, 1979, and thereafter at the average prime rate, compounded quarterly, as provided by 18 CFR 154.67.

The period of time for which interest is due shall be calculated from the date or dates said suspense royalty was received by Sun to the date or dates said suspense royalty was paid. Following the respective payouts, the remaining interest (principal according to the U. S. Rule) shall bear interest according to 18 CFR 154.67.

Sun has or can compile through its data base and computer program all of the necessary information with which to calculate the amount of interest due and owing.

All findings and orders set forth in the Journal Entry certifying the class are incorporated herein.

Excluded from this judgment are those parties who have filed herein their exclusion and those parties who did not receive notice.

Interest statutes in other states are not applicable here. (*Shutts, supra,* Pages 563-566.)

> "In the instant case Phillips was obligated by FPC order to pay gas purchasers seven percent (7%) until September 18, 1970, and thereafter eight percent (8%) interest on the gas purchaser's share of the suspense monies. Here equitable principles require, and contractural principles dictate, that the royalty owners receive the same treatment as to their share." (*Shutts, supra,* Page 563.)

> "Phillips cites the interest laws of Kansas, Texas and Oklahoma. K.S.A. 16-201 provides. . . Texas Rev. Civ. Stat., Art 5069-1.03 (1971) states. . . Oklahoma stat., title 15, §266 (1966) states. . . all these statutes refer to situations where there is no agreement as to the rate of interest. Here that situation does not exist." (*Shutts, supra,* Pages 563-564.)

> "We are dealing with 'suspense royalties' which never could or would belong to Phillips. This was the equivalent of a common fund which was accumulated and used by Phillips. . . If the FPC had denied all of Phillips' rate increase applications, Phillips would have had to pay seven percent (7%), and later eight percent (8%), interest to the gas purchasers *pursuant to its express agreement and corporate undertaking with the FPC. Thus, Phillips has made an express agreement,* with regard to the monies accumulated in the suspense fund by Phillips *to pay seven percent*

and later eight percent interest, as ultimately determined by the FPC Opinion No. 586."

". . . the FPC did require Phillips to agree to pay interest on the suspense monies they held, *which agreement the members of the plaintiff class herein assert as an appropriate measure of damages, expressed in terms of interest, for the commingling and use of the monies by Phillips."* (*Shutts, supra,* Pages 564-565. Emphasis supplied.)

Thus, it is the Kansas law that neither the statutory interest rates of Kansas nor the statutory interest rates of other states where there are nonresident lessors, apply. Rather, the rates of interest as determined by FERC apply as a measure of damages.

Sun may not enrich itself in the absence of any contractural sanction or seize upon the procedural complexities of the FPC to avoid responsibility for an appropriate measure of damages, expressed in terms of interest.

Judgement shall be entered herein as of December 12th, 1983, for plaintiff class in accordance with the foregoing conclusions. Since judgement is for damages for unjust enrichment, expressed in terms of interest, the statutory judgement rate of 15% (K.S.A. 16-204) should apply.

Plaintiff is requested to draw the appropriate Journal Entry to conform to the foregoing findings of fact and conclusions of law.

/s/ Clarence E. Renner
CLARENCE E. RENNER
District Judge

Original - file
Copy: Mr. Luke Chapin
Mr. Gerald Sawatzky

(Filed December 29, 1983)

IN THE DISTRICT COURT OF BARBER COUNTY, KANSAS

No. 79C40

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC Opinions or FERC,
Plaintiffs,

vs.

SUN OIL COMPANY, a Delaware Corporation,
Defendant.

JOURNAL ENTRY OF JUDGMENT

ON the 13th day of October, 1983, at ten o'clock a.m., this case comes regularly on for hearing and trial. Plaintiffs appear by and through W. Luke Chapin of Chapin & Penny, Attorneys, Medicine Lodge, Kansas 67104; and Ed Moore, Ginder & Moore, 202 South Grand, Cherokee, Oklahoma 73728. Defendant Sun Oil Company appears by and through William C. Phillips, Sun Exploration & Production Company, IV North Park, P. O. Box 2880, Dallas, Texas 75221; and Gerald Sawatzky, Foulston, Siefkin, Powers & Eberhardt, 700 Fourth Financial Center, Wichita, Kansas 67202.

THEREUPON, parties announce to the court that they are ready for trial; the evidence is introduced; and the court takes the matter under advisement, asking for written suggested finding of fact and conclusions of law from the parties within thirty days.

THEREAFTER, and as of December 12, 1983, the court, having heard the evidence and having received suggested findings and conclusions from the parties, and being well and fully advised in the premises, renders its memorandum decision, which is made a part hereof by reference.

The court finds, generally, in favor of plaintiff class and in accordance with their requested findings of fact and conclusions of law.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1) All findings and orders set forth in the Journal Entry certifying the class are incorporated herein.

2) The findings, conclusions and orders set forth in the court's Memorandum Opinion and Decision of December 12, 1983, are incorporated herein and made a part hereof.

3) Plaintiff class is granted judgment against Sun for interest on all royalty and overriding royalty retained by it during the period that royalties were collected and suspended by Sun pending approval by the FPC (FERC) and the courts of certain rate increases under Opinion No. 586, as to suspended royalties paid in 1978; and under Opinion Nos. 699 and 770, with the exception of those who excluded themselves and those whom the first class mail notice did not reach.

4) Sun Oil Company is instructed to compile necessary information and to calculate the amount of interest due and owing plaintiff class and each member thereof, according to findings and conclusions of the court.

5) Applicable rate of interest to be used by Sun in calculating amount due each royalty owner is 7% per annum until October 10, 1974, 9% per annum thereafter until September 30, 1979, and thereafter at the average

prime rate, compounded quarterly, as provided by 18 CFR 154.67.

6) Judgment is entered herein as of December 12, 1983, and since judgment is for damages for unjust enrichment, expressed in terms of interest, the statutory judgment rate of 15% (K.S.A. 16-204) shall apply following date of judgment.

7) Sun shall inform attorneys for plaintiff class when interest calculations have been completed and as to the total amount of the same; and the court shall then set the matter for further hearing as to attorneys' fees for attorneys for plaintiff class.

/s/ Clarence E. Renner
CLARENCE E. RENNER
District Judge

APPROVED AS TO FORM:

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By /s/ W. Luke Chapin
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By .....
Attorneys for Defendant
Sun Oil Company

§ 60-223. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate

over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in prosecuting or defending separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against members of the class; (C) the appropriate place for maintaining, and the procedural measures which may be needed in conducting, a class action.

(c) Determination by Order Whether Class Action to Be Maintained: Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement and before the decision on the merits of an action brought as a class action, the court shall determine by order whether it is to be maintained as such. Where necessary for the protection of a party or of absent persons, the court, upon motion or on its own initiative at any time before the decision on the merits of an action brought as a nonclass action, may order that it be maintained as a class action. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) The judgment in an action maintained as a class action shall extend by its terms to the members of the class, as defined, whether or not the judgment is favorable to them.

In any class action maintained under subdivision (b) (3), the court shall exclude those members who,

by a date to be specified, request exclusion, unless the court finds that their inclusion is essential to the fair and efficient adjudication of the controversy and states its reasons therefor. To afford members of the class an opportunity to request exclusion, the court shall direct that reasonable notice to be given to the class, including specific notice to each member known to be engaged in a separate suit on the same subject matter with the party opposed to the class.

(3) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues such as the issue of liability, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this section shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this section applies, the court may, without limitation, make appropriate orders: (1) Settling the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, or to include such allegations, and that the action in either case proceed accordingly. The orders may be combined

with an order under K.S.A. 60-216, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. An action brought as a class action, whether or not ordered to be maintained as provided in paragraph (1) of subsection (c), shall not be dismissed or compromised without the approval of the court, and the court in its discretion may order that notice of a proposed dismissal or compromise be given to the class in such manner as the court may direct.

PETITIONER'S STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

Sun Oil Company's assets have been transferred to Sun Exploration and Production Company. The parent company in both instances is Sun Company, Inc. The non-wholly owned subsidiaries of Sun Company, Inc. are Suncor Inc. and Sunolin Chemical Company. The non-wholly owned subsidiaries of Sun Exploration and Production Company are Canyon Reef Carriers, Inc.; East Texas Salt Water Disposal Company and Van Salt Water Disposal Company.

Supreme Court, U.S.
FILED
AUG 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1971

In the Supreme Court of the United States

October Term, 1984

SUN OIL COMPANY,
Petitioner,

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and As Representatives of All Producers and Royalty Owners to Whom Sun Oil Company Has Made or Should Make Payment of Suspended Proceeds of Royalties Pursuant to FPC Opinions or FERC,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

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SUN OIL COMPANY,
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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

This case, except for the numbers, has essentially the same facts as *Phillips Petroleum Co. v. Shutts, et al.*, No. 84-233, decided by this court June 26, 1985.

During the 1970's, petitioner (Sun) suspended, held and used $3,843,000.00 of its royalty owners' money, which was later paid over to its royalty owners without interest. Suspensions were of the royalty owners' share (1/8th) of increases allowed by FPC rate increase schedules but not fully approved in the courts.

This class action was commenced August 30, 1979, in behalf of 3,159 of Sun's gas royalty owners whose royalties had been suspended and used without interest.

Sun's royalties were paid by virtue of oil and gas leases in six states: Texas, Oklahoma, Louisiana, New Mexico, Mississippi and Kansas.

Sun's suspensions of gas royalties were made according to *nationwide* gas price regulatory orders issued by FPC (FERC), Nos. 699, 699H, 770 and 770A.

The Kansas trial court allowed moratory or equitable interest on the suspense royalties at rates approved by FPC for repayment of the same funds to purchasers, if required. The Kansas Supreme Court affirmed.

SUMMARY OF ARGUMENT

1. Question of "minimum contacts" first raised by petitioner was settled by *Shutts II* (84-233).

2. Due process rights also have been settled by the decision in *Shutts II*.

3. Only question remaining is the "application of Kansas Law" to the claims of all plaintiff class members including nonresidents whose oil and gas leases are outside of Kansas.

4. It is not Kansas law that sets the interest rate in this case, but:

a. Interest rates were set not by laws of Kansas or other states but by rule of FPC to avoid unnecessary enrichment for use of money according to current prime bank interest rates.

b. Interest rates do not have to be reconciled as between states. The Texas *Stahl*[1] case, although allowing interest as an equitable matter, applies the Texas rate where there was no agreement, rather than the equitable rate. The only other case of other states directly in point and considering equitable interest was

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1. *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978)

Boutte v. Chevron Oil Co., 316 F. Supp. 524 (D. La. 1970), where the court held:

"In the event that the FPC approves the provisionally increased rates or any part thereof, interest shall be due and payable, at the rate finally adopted by the FPC, to the royalty owners on the difference between any increase in rate, as finally determined by the FPC and the amounts previously paid to the royalty owners."

ARGUMENT

The Sun brief was filed about a week before decision in *Shutts II* (84-233) was handed down by this court. Therefore, Sun's brief is combined and confusing as to points it attempts to make on due process, minimum contacts and full faith and credit.

The question remains in this case, just as in *Shutts II*:

"Should defendant pay interest for use of its royalty owners' suspense monies and at what rate?"

The trial court, as a part of its conclusions of law in this case, quoted from *Shutts I* (222 Kan. 527, 567 P.2d 1392, cert. denied 435 U.S. 961) as follows (Petition, A-21-22):

"5. The appellant argues this action should be brought in several different state courts. This risks inconsistent adjudications for a class which is otherwise treated alike." (Page 545.)

"6. There are questions of law and fact common to the plaintiff class." (Residents and nonresidents) (Page 546.)

"7. After reviewing K.S.A. 60-223, we hold Kansas courts can exercise jurisdiction over nonresident plaintiffs in a class action if procedural due process guarantees are met." (Page 547.)

"8. . . . A class action may be binding on nonresident plaintiffs when a 'common fund' is involved and where due process requirements are met." (Page 552.)

"11. The class is more manageable with nonresidents of Kansas included because all royalty owners were treated alike, regardless of residency, particular lease provisions or royalty agreements." (Page 556.)

"12. All of the royalty owners have a common interest in the money collected as suspense royalties." (Page 557-558.)

"13. It was the same FPC regulation that caused the suspense royalties to be collected." (Page 558.)

"14. Suspense royalties were paid out pursuant to the same FPC opinion." (Page 558.)

"15. All of the gas royalty owners have an interest in common with each other, in the equivalent of a 'common fund' to claim damages payable as interest and they have a contact with Kansas by reason of such common interest." (Page 558.)

In this case there is one key fact: for several years Sun used money owed to royalty owners all the while knowing it never owned the money. While Sun collected 8/8ths of the increased rates, the 1/8th royalty share could never belong to Sun. That royalty share, according to eventual FPC ruling, was either to go to royalty owners, or back to purchasers with interest, or part to one and part to the other. This is true regardless of whether the in-

creased rates were ultimately approved, disapproved or approved in part and disapproved in part by the FPC. Finally the rate increases were approved in part, the approval conclusively determining that from the date of application of the increased rates the gas was worth the increased amount. Therefore, there is but one question of law: does justice require Sun to pay interest for using the royalty owners' money?

Although the Kansas courts in this case specifically declined to rest their decision on any facet of a fiduciary relationship, a resulting or constructive trust theory is particularly applicable to this appropriation and commingling of money never belonging to Sun.

Clearly, where one holds legal title to property or money, the beneficial interest of which belongs to another, then a resulting trust or a constructive trust arises. (76 Am. Jur. 2d, *Trusts*, Section 196, Page 429.)

In *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386, 122 N.E. 378, Judge Cardozo speaking for the court said:

> "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."

The effect, of course, is to prevent unjust enrichment. (66 Am. Jur. 2d, *Restitution and Implied Contracts*, Section 3 at 945.) And see Professor Scott's definition of constructive trust, saying:

> "A constructive trust arises where a person who holds title to property is subject to an equitable duty to

convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." (5 A. Scott, *Law of Trusts*, Section 462 at 3413, 3d Edition, 1967.)

In *Pound*, "The Progress of the Law, Equity," 33 Harvard Law Review 420, the late Dean pointed to constructive trusts as a legitimate means of gaining restitution of a received benefit in order to prevent unjust enrichment.

In 76 Am. Jur. 2d, *Trusts*, Section 196 at 420, resulting trusts were described as follows:

"The doctrine of resulting trusts is a familiar one in equity jurisprudence. Broadly speaking, a resulting trust arises from the nature or circumstances of consideration involved in a transaction whereby one person thereby comes invested with a legal title but is obligated in equity to hold his legal title for the benefit of another. . ."

A resulting trust will arise despite the absence of fraud or the intent of the parties. (76 Am. Jur. 2d, Section 196 at 429.)

Since *Moses v. MacFerlan*, 2 Burr. 1005 (King's Bench 1760) it has been settled in equity jurisprudence that suit may be brought for the return of money secured for the use of another party. Clearly Sun had nothing but bare right of possession to the share of plaintiff class in the increased gas royalty payments. In *MacFerlan*, the court said:

"This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or oppression; or

undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances."

The FPC did not merely require Sun to repay the same amount received, but rather ordered that if the increased rates were not allowed, the amount paid would be returnable with interest as set forth in the opinion in this case. Sun applied for the increases and accepted the terms of the FPC regulation with this precise understanding.

In accordance with the long standing rationale of *MacFerlan,* federal courts have enforced the FPC interest order in several cases, generally relying on theories of unjust enrichment. Such cases sustained the FPC order to refund with interest, saying, for example, "the imposition of interest on refunds ordered by the Federal Power Commission is not an inappropriate means of preventing unjust enrichment." *United Gas Improvement Co. v. Callery Properties,* 382 U.S. 233, 15 L. Ed. 284, 86 S. Ct. 360. See also, *Texaco, Inc. v. FPC,* 290 F.2d 149 (1961); and see *In Re Permian Area Rate Cases,* 88 S. Ct. 1344 (1968); *Skelly Oil Co. v. FPC,* 401 F.2d 726 (1968); and *Continental Oil Co. v. FPC,* 378 F.2d 510, where the gas producers argued imposing 7% interest did not adequately consider the rate of return on the funds, or was punitive. But the courts held 7% interest was reasonable and necessary to prevent unjust enrichment.

The FPC protects the rights of the producers and the purchasers when temporary increases are granted. The only ones unprotected are the royalty owners who are paid at the old rate while the producer uses the money and the purchaser's rate base for assessment of charges is at the new increased prices. In this case, use of the money by Sun was of benefit to Sun and this fact is undisputed.

Power of a court to assess interest as a means of forming an equitable remedy is settled:

> "It must not be forgotten that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them." *Union Pacific Ry. v. Chicago, R.I.,* 163 U.S. 564, 601, 16 S. Ct. 1173, 1187, 41 L. Ed. 265 (1896).

Plainly, equity will not place limits on the remedies which it can grant, ". . . either with respect to their substance, their form or their extent, . . ." but will invent new remedies or modify old ones as necessitated by changing social conditions and to meet the ". . . new kinds of wrongs (which) are constantly committed." I. J. Pomeroy, *A Treatise on Equity Jurisprudence,* Section 111 at 143 (5th Ed., Symons 1941).

There is nothing in the interest statutes of the other five states involved that would not allow the Kansas court to grant equitable or moratory interest in this case. There is nothing in the interest statutes of other states involved that would not allow the granting of FPC interest where Sun has agreed to pay FPC interest to purchasers in the event of refund of the same money.

Any alleged conflict overlooks the essential basis for the suit, seeking interest as required by justice and equity. No authority has been found demonstrating Texas or Oklahoma or any other state involved takes a narrower view of that requirement.

Shutts I carefully examined the cases of Texas and Oklahoma and found there was no conflict in applying FPC interest in these Kansas cases. In fact, the Kansas court in *Shutts I* specifically found that there was an ex-

press agreement on the part of Phillips to pay royalty owners interest at FPC rates.

In *Shutts I* at Page 564, it is said:

> "We are dealing with 'suspense royalties' which never could or would belong to Phillips. This was the equivalent of a common fund which was accumulated and used by Phillips. . . Phillips was a stakeholder who retained the fund which it used for its own benefit . . . if the FPC had denied all of Phillips' rate increase applications, Phillips would have had to pay 7% and later 8%, interest to the the gas purchasers pursuant to its express agreement and corporate undertaking with the FPC. Thus, Phillips has made an express agreement, with regard to the monies accumulated in the suspense fund by Phillips, to pay 7% and later 8% interest, as ultimately determined by the FPC Opinion No. 586." (*Shutts,* Appendix 59a.)

> "Here, of course, an agreement for the payment of interest on the part of Phillips is clearly present." (*Shutts,* Appendix 60a.)

The *Stahl* case in Texas is not to the contrary. It allows interest as an equitable remedy. However, because Stahls requested only 6% interest as if there had been no agreement for interest, the higher FPC rate was not discussed.

Oklahoma has no case pertaining to the collection of interest on FPC suspense monies used by the producer.

Clearly, this is a transitory action acting upon the person of the defendant, requiring the payment of interest upon suspense royalties used by defendant and later paid out to royalty owners. The fact that the action is premised upon compensation for defendant's use of the monies, which

arose from royalties from oil and gas leases in six states, does not convert the action from one in personam to one in rem.

The applicable interest rate in this case according to 18 CFR 154.67 is 9% per annum during the periods of suspension and until September 30, 1979. Thereafter, the accumulated interest during 1980 and 1981 shall bear rates, according to FPC, at the average prime rate, compounded quarterly.

Awarding interest in this case, considering all other cases and authority involving unjust enrichment, is mandatory. Other federal cases are quoted above where awards of interest for unjust enrichment in excess of statutory rates have been allowed.

Because royalty owners should be compensated for what they lost, adherence to the statutory interest rates works a gross injustice. The money was lost during periods of rampant inflation and by simply looking at what Sun gained, such awards are shown to be inadequate.

By accepting the increases on the condition of having to repay purchasers, with interest at FPC rates, even remotely prudent practices dictate that Sun invested the money so as to yield at least 9%.

Sun's allegations that other states involved would decide the matter differently as to interest rates are not supported by the cases from other states. "The court's heavy reliance on the characterization of the law provided by Phillips (Sun) is not an adequate substitute for neutral review." (Justice Stevens Concur-Dissent, *Shutts II*, Page 16 (Slip Opinion).)

In this case, the trial court considered interest statutes in other states and held they did not apply. (Petition, A-25, 26.) The Kansas Supreme Court affirmed. (A-7, 8.)

Sun's contentions concerning statute of limitations are contrary to the decision of the Kansas Supreme Court on interest according to the U. S. Rule and also to this court's *Keaton v. Hustler Magazine, Inc.*, 104 S. Ct. 1473.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 56,494

RICHARD WORTMAN and HAZEL MOORE, *Appellees*, v. SUN OIL COMPANY, *Appellant*.

SYLLABUS BY THE COURT

1. OIL AND GAS—*Class Action—Issues Regarding Commonality, Due Process and Improper Interest.* The issues raised concerning commonality, due process, and improper interest are identical to, and thereby controlled by *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 679 P.2d 1159, *cert. granted* ..... U.S. ..... (October 9, 1984).

2. APPEAL AND ERROR—*Consideration of Issue on Appeal Not Considered by Trial Court—When Proper.* An issue may be considered on appeal even though not considered by the trial court if it involves only a legal question arising from proven or admitted facts finally determinative of the case or if consideration is necessary to serve the ends of justice or to prevent a denial of a fundamental right. *State v. Puckett*, 230 Kan. 596, 640 P.2d 1198 (1982).

3. WORDS AND PHRASES—*"Mutual, Open, Running Account."* A mutual, open, running account is an account kept in writing of a connected series of debit and credit entries of reciprocal charges and allowances which the parties intend not to be considered independently but as a continuation of a related series. The statute of limitations, therefore, does not run against each item separately, but only against the balance due.

4. OIL AND GAS—*Suspense Royalties—Interest—Application of United States Rule.* The "United States Rule" is applicable to interest on suspense royalties. It provides that in applying partial payments to an interest-bearing debt, which is due, in the absence of an agreement or statute to the contrary, the payment shall be first applied to the interest due, then to principal.

5. INTEREST—*Post-judgment Interest—When Proper.* Post-judgment interest is proper on an unpaid judgment, when the sum owed is certain or can be easily ascertained by calculation at the time of judgment.

Appeal from Barber district court: CLARENCE E. RENNER, judge. Opinion filed October 26, 1984. Affirmed and remanded.

Jim H. Goering, of Foulston, Siefkin, Powers & Eberhardt, of Wichita, argued the cause, and *Gerald Sawatzky,* of the same firm, and *William C. Phelps,* of Sun Exploration and Production Company, of Dallas, Texas, were with him on the briefs for the appellant.

W. Luke Chapin, of Chapin & Penny, of Medicine Lodge, argued the cause, and *Ed Moore,* of Ginder & Moore, of Cherokee, Oklahoma, was with him on the brief for the appellees.

The opinion of the court was delivered by

HERD, J.: This is a class action to recover prejudgment interest on suspended gas royalties held and used by Sun Oil Company for several years. Sun appeals from the district court judgment in favor of the class.

Appellees are owners of mineral leaseholds located in Texas, Oklahoma, Louisiana, Mississippi, New Mexico and Kansas. Appellant is the lessor which produces natural

gas from each appellee's leasehold. The royalty owners seek prejudgment interest on certain gas price increases received by Sun but held in suspension for a period of time.

On several occasions during the 1960's and 1970's, the Federal Power Commission (FPC) allowed Sun to charge its purchasers increased rates for the natural gas produced from appellees' leaseholds. During the pendency of the administrative proceedings and appeals involving these price increases, Sun began receiving money at the increased rates, but did not pay the increase to its royalty owners. In order to qualify for the price increases, the FPC required Sun to enter into an undertaking which required it to refund to its purchasers any price increases which were not ultimately approved. Sun then informed its royalty owners payment of the increased price would be suspended until final approval of the increases.

The principal price increases which were the basis for the current action are set out in FPC Opinions 699, 699H, 770 and 770A. Opinion No. 586, rendered in 1968, had been decided pursuant to the FPC's "area rate approach" and involved only the Hugoton-Anadarko area which consists of all of Kansas and parts of Oklahoma and Texas. In 1974, the FPC abandoned the area rate approach in Opinion No. 699. Opinions 699, 699H, 770 and 770A set "national rates." It was during the administrative and court appeals concerning these FPC increases that Sun began to receive the increased rates on which the royalty owners now claim interest.

The price increases allowed by Opinions 699 and 699H were collected by Sun from July, 1974, through April, 1976. A total of 670 properties were involved: 43.7% from Texas, 24% from Oklahoma, 22.8% from Louisiana, 3.9% from New Mexico, 3.4% from Mississippi, and 2.1%

from Kansas. Nine hundred eighty-one interest holders were affected. The total suspended royalty under these opinions was $1,167,000. This amount was paid to the royalty owners in July, 1976.

The price increases allowed by opinions 770 and 770A were collected by Sun between December, 1976 and April, 1978. A total of 690 properties were involved: 40.3% from Texas, 31.6% from Oklahoma, 23.6% from Louisiana, 3.3% from New Mexico, 0.9% from Mississippi, and 0.3% from Kansas. One thousand three hundred fifty-three interest holders were affected. The total suspended royalty under these opinions was $2,676,000. This amount was paid to the royalty owners in April, 1978.

The royalty owners' lawsuit was filed as a class action on August 30, 1979. Notice of the lawsuit was sent by first-class mail to each royalty owner. Three thousand one hundred fifty-nine notices were mailed out. One hundred five of the class members opted out.

The trial court held prejudgment interest was due from Sun to the royalty owners on the suspended gas royalties. Post-judgment interest was also awarded. Sun Oil Company appeals.

Appellant first argues Kansas law is violated by including in the plaintiff class nonresident members who do not own Kansas leases. Sun claims such a class action fails to meet the commonality prerequisite stated in *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527, 557, 567 P.2d 1292 (1977), *cert. denied* 434 U.S. 1068 (1978) (*Shutts I*): "When liability is to be determined according to varying and inconsistent state laws, the common question of law or fact preprequisite of K.S.A. 60-223(a)(2) will not be fulfilled." *Shutts I*, in which the commonality

requirement was fulfilled, pertained to three states and this case pertains to six states. The six states obviously present more variation in laws than the three; however, this case presents the same issues as those in *Shutts I*.

There are substantial facts supporting commonality in this suit which is brought for interest on suspended royalties. The difference between the two cases is merely the degree of Kansas ownership to the total. All members of the plaintiff class are royalty owners of Sun. Their royalties were suspended at the same time. Sun accumulated and used the suspended royalties of all the owners. Sun notified all royalty owners of suspension at the same time. Sun paid all the owners the suspended royalties at the same time. The FPC opinions regulated the rates of all the royalty owners. Sun kept its records and treated all royalty owners the same, regardless of residency.

Sun next argues the due process clause of the Fourteenth Amendment prohibits Kansas from asserting jurisdiction over nonresident class members who do not have "minimum contacts" with Kansas. The basis of its argument is that the United States Constitution requires the existence of a substantial relationship between a state and any individual over which the state court seeks to assert jurisdiction. *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878). Sun further argues that since *Pennoyer*, the United States Supreme Court has insisted the state asserting jurisdiction have "minimum contacts" with the party, plaintiff or defendant. See *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), and *Shaffer v. Heitner*, 433 U.S. 186, 212, 53 L.Ed.2d 683, 97 S.Ct. 2569 (1977). Sun concludes there were no such "minimal contacts" between the nonresident plaintiffs and the State of Kansas. This issue was discussed in depth in

Shutts I. Additionally, we held in *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, Syl. ¶ 1, 679 P.2d 1159, *cert. granted* ..... U.S. ..... (October 9, 1984) (*Shutts II*):

> "While the essential element to establish in personam jurisdiction over nonresident defendants is some 'minimum contact' between the defendant and the forum state, the element necessary to the exercise of jurisdiction over nonresident plaintiff class members is procedural due process."

Sun contends this Kansas rule is incorrect and should be reversed.

Sun next maintains the trial court applied an improper interest rate to the suspended royalties. Pursuant to Sun's agreement with the FPC to refund to gas purchasers any accumulated amounts of unapproved price increases. Sun also agreed to an interest rate to be paid on those amounts. The trial court applied that agreed-upon rate to the suspended royalties. Sun argues the statutory prejudgment rate of interest of each state should instead be applied. The Court of Appeals held in *Gray v. Amoco Production Company*, 1 Kan. App. 2d 338, 341, 564 P.2d 579 (1977), *aff'd in part, rev'd in part* 223 Kan. 441 (1978), that the law of the forum pertaining to interest was applicable rather than the laws of the various states of residence of the plaintiffs. In *Shutts I*, 222 Kan. 527, Syl. ¶ 22, we stated:

> "Where a gas producer, under circumstances described in the foregoing syllabus, files a corporate undertaking with the Federal Power Commission, wherein it *agrees* to pay 7% interest on 'FPC suspense monies' until rate proceedings are determined by the commission, and 8% thereafter on the gas purchasers' share of the 'impounded' money, in the event the com-

> mission orders a refund, equitable principles require that the royalty owners receive the same treatment as to their share . . . ."

The foregoing issues concerning commonality, due process, and improper interest are identical to those raised and decided in our previous decision in *Shutts II*, 235 Kan. 195, and are almost identical to *Sterling v. Marathon Oil Co.*, 223 Kan. 686, 576 P.2d 635 (1978); *Sterling v. The Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325 (1977), *cert. denied* 434 U.S. 1067 (1978); *Maddox v. Gulf Oil Corporation*, 222 Kan. 733, 567 P.2d 1326 (1977), *cert. denied* 434 U.S. 1065 (1978); *Shutts I*, 222 Kan. 527; *Helmley v. Ashland Oil, Inc.*, 1 Kan. App. 2d 532, 571 P.2d 345, *rev. denied* 222 Kan. 749 (1977); *Gray v. Amoco Production Company*, 1 Kan. App. 2d 338.

It is interesting to note Sun Oil Company, appellant in this case, filed an *amicus* brief in *Shutts II* in opposition to the royalty owners' position there. All three issues were thoroughly discussed and decided adverse to Sun's position in that case.

Sun's reply brief in this case was filed after the decision in *Shutts II*, giving it the full benefit of that decision. Its argument here is that *Shutts II* should be reversed. Sun presented no new matter in support of this contention other than that discussed and rejected in *Shutts II*.

We have reconsidered all of Sun's arguments on the first three issues and find no reason to reverse *Shutts II*. Thus, the issues raised justify no further discussion; we merely reaffirm our previous decisions.

The next issue raised by Sun Oil is whether a portion of appellees' claim is barred by the statute of limitations. Price increases allowed by Opinion 699 and 699H were

collected by Sun from July, 1974 to April, 1976. They were paid out in July, 1976. Also in July, 1976, the FPC issued Opinion 770. Price increases from Opinion 770 and 770A were collected by Sun between December, 1976 and April, 1978, when this amount was paid. This action was filed August 30, 1979, on the theory of unjust enrichment, which is in the nature of an implied contract. Thus, the three-year statute of limitations of K.S.A. 60-512 is the period about which their argument centers. It provides:

> "The following actions shall be brought within three (3) years: (1) All actions upon contracts, obligations or liabilities expressed or implied but not in writing. (2) An action upon a liability created by a statute other than a penalty or forfeiture."

Appellant contends recovery for interest on suspense royalties paid in July, 1976, are barred by the three-year statute of limitations.

This issue was raised at trial, but the trial court made no specific ruling on it. We have held if an issue on appeal involves only a legal question arising on proven or admitted facts finally determinative of the case or if consideration is necessary to serve the ends of justice or to prevent a denial of fundamental rights, the appellate court may consider the issue even though it was not considered by the trial court. *State v. Puckett*, 230 Kan. 596, Syl. ¶ 1, 640 P.2d 1198 (1982). The issue raised by Sun of statute of limitations is a question of law. The record was uncontroverted as to when payments were made, when the opinions were issued, and when the case was filed. We conclude this is a question of law properly before this court.

The royalty owners argue the payments are not one-time transactions as contemplated by the three-year stat-

ute of limitations of K.S.A. 60-512, but rather are open accounts since each royalty owner is paid monthly for his or her share of gas produced. We defined an open account in *Spencer v. Sowers*, 118 Kan. 259, 261-62, 234 Pac. 972 (1925), as follows:

> "A mutual open, current account may be defined as an account usually and properly kept in writing, wherein are set down, by express or implied agreement of the parties concerned, a connected series of debit and credit entries of reciprocal charges and allowances, and where the parties intend that the individual items of the account shall not be considered independently but as a continuation of a related series, and that the account shall be kept open and subject to a shifting balance, as additional related entries of debits or credits are made thereto, until it shall suit the convenience of either party to settle and close the account; and where, pursuant to the original, express or implied intention, there is to be but one single and individual liability arising from such series of related and reciprocal debits and credits, which liability is to be fixed on the one party or the other as the balance shall indicate at the time of settlement or following the last pertinent entry of the account."

If an account is mutual, open and running, the statute of limitations runs on the balance of the account, thereby tolling the statute until final payment is made.

The payments made in July, 1976, by Sun, were not a part of the royalty owners' monthly payments for their share of gas produced, but were for an amount of royalty suspended for a period of time and then paid out in a lump sum to each royalty owner. Subsequent monthly royalty payments had no relationship to the July, 1976 payment

or interest thereon. We hold, therefore, the transactions between Sun and the royalty owners pertaining to interest on suspended royalty not to be a mutual, open, running account.

However, that does not dispose of this issue. We held in *Shutts I* that the "United States Rule" applies to interest on suspense royalties. The "United States Rule" provides that in applying partial payments to an interest-bearing debt which is due, in the absence of an agreement or statute to the contrary, the payment shall be first applied to the interest due, then to principal. 45 Am. Jur. 2d, Interest and Usury § 99, pp. 88-89; *Shutts I*, 222 Kan. 527; *Jones v. Nossaman*, 114 Kan. 886, 221 Pac. 271 (1923); *Christie v. Scott*, 77 Kan. 257, 94 Pac. 214 (1908). By applying the July 1976 payment under FPC Opinions 699 and 699H first to interest and then to suspended royalty, as required by the U.S. Rule, the statute of limitations issue is eliminated. The balance owed the royalty owners is royalty not interest. While interest is covered by implied contract, the payment of royalty is provided for in a written lease, which has a five-year statute of limitations pursuant to K.S.A. 60-511. This statute provides:

> "The following actions shall be brought within five (5) years: (1) An action upon any agreement, contract or promise in writing."

Thus, we conclude this action is not barred by the statute of limitations.

The final issue involves the award of post-judgment interest by the court. Sun argues the granting of post-judgment interest by the trial court in this case was improper since the exact amount of the award permitted pursuant to the court's judgment was unknown at the time of the court's final decision. The court awarded in-

terest at a set rate on each class members' accrued royalties. Thus, after the final judgment, the accrued royalties of each royalty owner had to be multiplied by the interest rate mandated by the court. This did not render the judgment so uncertain as to preclude post-judgment interest. The amount of accrued royalty for each individual and the interest rate were both known at the time of the court's judgment; to determine the exact amount owed under the court's order Sun merely had to multiply these two figures. In the other Kansas suspended royalty cases, cited previously, post-judgment interest was granted when the amounts were unknown to the same extent they are unknown in this case. This issue is without merit.

The judgment of the trial court is affirmed and the case remanded for determination of attorney fees, post-judgment interest, and entry of judgment consistent with this opinion.

HOLMES, J., not participating.

(Filed December 13, 1983)

IN THE DISTRICT COURT OF BARBER COUNTY, KANSAS

Case No. 79C40

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all producers and royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC Opinions or FERC,
Plaintiffs,

-vs-

SUN OIL COMPANY, a Delaware Corporation,
Defendant.

MEMORANDUM DECISION

Judgement for the plaintiff is hereby rendered in accordance with the following findings of fact and conclusions of law on this 12 day of December, 1983.

FINDINGS OF FACT

The plaintiffs in this action are Richard Wortman, who is a gas royalty owner under a Kansas oil and gas lease to whom Sun accounts for his gas royalties, and Hazel Moore, who is a gas royalty owner under an Oklahoma oil and gas lease to whom Sun accounts for her gas royalties. Both appear individually and as representatives of a class of persons defined as follows:

> "All royalty owners and overriding royalty owners to whom Sun Oil Company (Sun) made payment of

suspended royalties after August 23, 1974, through 1979, pursuant to Federal Power Commission Opinion Nos. 586, 699, 699H, 770 and 770A."

Plaintiffs will hereinafter, either individually or as representatives of a class, be referred to as "Wortman". The defendant is Sun Oil Company, hereinafter referred to as "Sun".

This class action against Sun seeks to recover interest on additional or suspense gas royalties paid by Sun at various times from and after August 23, 1974, relating to the above mentioned FPC and FERC Opinions, to its royalty owners and overriding royalty owners subsequent to approval by FPC and FERC and the courts of certain proposed rate increases on gas sales in the six states of the United States, where Sun is engaged in producing natural gas.

Both Wortman and Moore have received royalties previously suspended pursuant to one or more of the above mentioned FPC or FERC Opinions.

Sun did not pay any interest on the suspended royalties which were eventually paid to the plaintiffs and the plaintiff class pursuant to the above mentioned FPC and FERC Opinions.

Opinion No. 586 involves only the Hugoton-Anadarko area as defined by PFC and which consists of all of the State of Kansas and parts of the States of Oklahoma and Texas.

Beginning with Opinion 699, the FERC eliminated the area by area pricing scheme it had been employing and established a nation-wide rate for qualified gas. Additionally, Opinions 699, 699H, 700 and 700A set certain rates governing the sale of natural gas in interstate com-

merce. During the pendency of subsequent administrative and court appeals involving these opinions, Sun began receiving money at the increased rates set forth in these opinions but did not pay the increase out to its royalty owners.

Through the use of notice slips accompanying regular royalty checks, Sun informed the royalty owners that until final approval of the various opinions, payment of the increased proceeds would be suspended. Copies of such notices are attached, marked Exhibit 1-3.

Under Opinion 586, there were 4,727 interests paid $470,223.05; but it is believed that only about $13,000.00 has been paid since 1973, this money having been accumulated from November, 1968, through November, 1970, but not paid out to royalty owners until on or about August 28, 1978.

Under Opinion 699 and 699H, 981 interest holders nation-wide received $1,167,000.00 in suspense royalties in July, 1976, same having been accumulated from July, 1974, through April, 1976.

Under Opinions 770 and 700A there were about 1,353 interest holders, nation-wide, who received suspended royalties of about $2,676,000.00, same having been accumulated from July of 1976 through January of 1978, and paid out principally in April, 1978.

Sun has admitted that no interest was paid on proceeds held in suspense that were ultimately paid to the royalty owners.

The court has ordered that plaintiff Wortman and Moore are members of a class of approximately 2,300 members (actually, 3,159 notices were mailed by plaintiffs) of royalty owners and overriding royalty owners who

Supreme Court, U.S.
FILED
AUG 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

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No. 84-1971

In the Supreme Court of the United States

October Term, 1984

SUN OIL COMPANY,
Petitioner,

vs.

RICHARD WORTMAN and HAZEL MOORE, Individually and As Representatives of All Producers and Royalty Owners to Whom Sun Oil Company Has Made or Should Make Payment of Suspended Proceeds of Royalties Pursuant to FPC Opinions or FERC,
Respondents.

REPLY BRIEF OF PETITIONER

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REPLY OF PETITIONER TO BRIEF IN OPPOSITION

On June 26, 1985, this Court decided *Phillips Petroleum Co. v. Shutts,* ..... U.S. ....., 86 L.Ed.2d 628, 105 S.Ct. 2965 (No. 84-233, June 26, 1985), which was virtually a companion case to our present case, being argued and decided by the Kansas Supreme Court shortly after it decided *Shutts.* In *Shutts,* this Court reversed in part and remanded for further proceedings.

Respondents' brief in opposition seeks to avoid this Court's holding in *Shutts,* that application of Kansas law

to out of state claims by nonresidents, identical to those in the instant case, is "sufficiently arbitrary and unfair as to exceed constitutional limits." ..... U.S. ....., 86 L.Ed.2d 628, 648, Slip Opinion, p. 21. As in *Shutts,* the Kansas courts in our case also "applied Kansas contract and Kansas equity law to every claim in this case," (86 L.Ed.2d at 643, *Shutts* slip opinion, p. 17) notwithstanding virtually all claims and all class members had no connection with Kansas. (Petition, pp. A5, A8) Respondents' invocation of equitable principles, which would turn Kansas law into a federal common law, is inappropriate in view of the federal constitutional principles applied in *Shutts.* It is not, therefore, necessary for us to point out Respondents' exaggeration and distortion of equitable principles, and Respondents' failure to state the countervailing equities which other states do recognize in their own laws which differ from Kansas law.

While this Court's *Shutts* decision requires a reversal of the Kansas court's failure to apply the applicable law of other states in this class action, there remain two material factual differences in the instant case, which, essentially ignored by Respondents, require separate attention.

(1) Apparently because the Kansas court treated the out of state claims as though they had arisen in Kansas, applying substantive Kansas law, the court also ignored the applicable statutes of limitations of its sister states by applying the Kansas five year statute of limitations relating to written contracts. (Petition, p. A11) We have pointed out that the states having the greatest number and amount of claims would have barred that portion of the interest claims relating to royalties paid out after FPC opinion nos. 699 and 699H became final. (Petition, pp. 13-15)

Yet the Kansas court ignored its own limitations "borrowing" statute, which adopts a sister state's limitation statute if the specified time limit is shorter than the applicable Kansas statute, to claims arising in other states unless the claim is held by a Kansas resident. (Petition, p. 13) These widespread "borrowing" statutes, enacted in almost every jurisdiction (See, 51 *Am.Jur.2d,* Limitation of Actions, Sec. 67, p. 646) properly preserved each state's policies applicable to claims governed by that state's laws. Yet the ruling below, ignoring the governing laws of other states, has also refused to effectuate important policies of those states embodied in their statutes of repose.

As noted by this Court in *Keeton v. Hustler Magazine, Inc.,* 465 U.S. ....., 104 S.Ct. 1473, 1480 n.10 (1984): "There has been considerable academic criticism of the rule that permits a forum State to apply its own statute of limitations regardless of the significance of contacts between the forum State and the litigation." The Court did not there find it necessary to decide the issue. This case, thus, presents an opportunity for this Court to speak definitively on whether a State's application of its own statute of limitations, to wholly foreign claims, "rises to the level of a due process violation."

(2) In *Shutts,* class members were provided "opt out" or "request for exclusion" forms appended to the notice of the class action sent to them. This Court held: "Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Shutts,* 86 L.Ed.2d at 643, slip opinion p. 14.

In the instant case, there was no such request for exclusion form supplied to the absent plaintiffs. (R. Vol. 1,

p. 67) Here, the notice contained within its text the mere recitation that "any person or concern so included [in the class] may by filing a written request to the Clerk of the District Court of Barber County, Kansas, Medicine Lodge, Kansas 67104, on or before the 5th day of April, 1983, be excluded from the class unless upon notice and after hearing and for stated reasons the court finds that inclusion is essential to the fair and efficient adjudication of the controversy." [The district court Notice is reproduced at the end of this Reply Brief.]

Since the absent class member's only information about the case is derived from the notice, the same due process requirement of a form which can be utilized to request exclusion, laid down in *Shutts*, supra, is equally applicable here. Thus, the failure to provide an "opt out" form constitutes a denial of procedural due process under the Federal Constitution which invalidates the judgment below.

CONCLUSION

Since the Kansas court held that its *Shutts* decision governed the result in the instant case, the partial reversal and remand by this Court in that case logically requires that a writ of certiorari issue in this case also, so that the cases will be decided consistently.

The denial of due process in failing to provide "opt out" forms to class members requires also that the judgment below be held void in its entirety as to all absent class members.

Therefore, the Court should reverse and remand with directions to set aside the judgment below. The remand and reversal should also direct the Kansas court, in future proceedings, to apply the interest laws and the limitations statutes of the states in which the claims arose.

Respectfully submitted,

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ADDENDUM

IN THE
DISTRICT COURT OF BARBER COUNTY, KANSAS

RICHARD WORTMAN and HAZEL MOORE, Individually and as representatives of all royalty owners to whom Sun Oil Company has made or should make payment of suspended proceeds or royalties pursuant to FPC Opinions or FERC Opinions, Plaintiffs,	)	
vs.	)	No. 79C40
SUN OIL COMPANY, a Delaware Corporation, Defendant.	)	

NOTICE OF CLASS ACTION SUIT

TO: All royalty owners and overriding royalty owners to whom Sun Oil Company (Sun) made payment of suspended royalties in 1975 through 1979, pursuant to Federal Power Commission Opinion Nos. 586, 699, 699H, 749, 749C, 770 and 770A.

This suit was filed in August, 1979, by plaintiffs, individually and on behalf of all royalty owners and overriding royalty owners to whom this notice is directed. Plaintiffs ask judgment against defendant for the payment of interest on suspended royalties paid by defendant in 1975 through 1979 attributable to increased gas sales prices received and withheld and used by defendant subsequent to August 2?, 1974. The leases involved are Sun's leases, nationwide. There are in excess of 1,000 gas royalty owners and overriding royalty owners who are members of the

proposed class and the above mentioned payments were in excess of $3,000,000.00.

Defendant Sun has denied any liability to plaintiffs or members of the class herein described.

The court has held that this action is to be maintained as a class action. Accordingly:

1. The court will include as members of plaintiff class herein all of the gas royalty owners and overriding royalty owners addressed above; provided, however, any person or concern so included may by filing a written request to the Clerk of the District Court of Barber County, Kansas, Medicine Lodge, Kansas 67104, on or before the 5th day of April, 1983, be excluded from the class unless upon notice and after hearing and for stated reasons the court finds that inclusion is essential to the fair and efficient adjudication of the controversy. Any class member, if so desired, may appear in the case in person or through his own counsel; otherwise, plaintiffs' counsel will represent him as a member of plaintiff class.

2. Judgment in this action, whether for the plaintiff class or for the defendant, will be binding on all class members except those who may be excluded as above stated. Class members excluded will not be entitled to share in the benefit of any judgment or settlement entered or concluded favorable to plaintiff class.

3. Plaintiffs' attorneys' fees are contingent on recovery. If the plaintiffs are successful, the court will allow a reasonable attorneys' fee for plaintiffs' attorneys, not exceeding 1/3rd, out of the interest fund created. If plaintiffs are unsuccessful, there will be no allowance of attorneys' fees, costs or expenses against you.

4. If you want further information, please do not call the Judge or Clerk of the Court, but call or write one of the attorneys listed below.

Dated: March 1, 1983.

CLARENCE E. RENNER, District Judge

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